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IN THE

Supreme Court of the United States

October Term, 1961.

No. 806.

GUSTAVE B. GARFIELD,

Petitioner,

v.

EDMUND PALMIERI,

Respondent.

REPLY BRIEF OF THE PETITIONER.

GUSTAVE B. GARFIELD,
Petitioner pro se,
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New York 17, N. Y.

THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1962

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Corrections to the Respondent's Statement of Facts.

At page 3 of his brief, the respondent quotes the District Court as saying that "*respondent 'stoutly maintains' that nothing in the opinion is false or untrue or was written or published with any malice or intent to injure or degrade.*"

There is no question but that District Judge Bryan wrote the quoted words, but the fact is that never at any time in any affidavit submitted by respondent Palmieri, nor by anyone on his behalf, did he faintly let alone "stoutly" maintain that "nothing in the opinion is false or untrue or was written or published with any malice or intent to injure or degrade." The fact is that respondent Palmieri personally interposed no affidavits, at all, in support of his motion to dismiss the complaint. Never did he say that he was not motivated by malice or an intent to injure or degrade in any paper filed in this action. That

allegation in the complaint stands undenied and conceded by the motion to dismiss.

If, as it is claimed, respondent Palmieri made any statement in which he "stoutly" maintained that nothing in the opinion was false or untrue or was written or published with any malice or intent to injure, it must have *been made* outside of the record, because he never did so on the record.

The sole affidavit submitted in support of the motion to dismiss was made by one Stephen Kurzman, an Assistant United States Attorney, who annexed a copy of a letter from the West Publishing Company dated February 8, 1960, written seven months after the filing and publication of the opinion in the office of the Clerk of the District Court, on July 15, 1960, in which West requested Judge Palmieri to send it a copy of "your unreported opinion in the above case together with the names and addresses of the attorneys for the respective parties and the filing date with a view to publication in the Federal Supplement so that a definite volume and page reference may be given" (Exhibit C, page 9a-Appendix).

Mr. Kurzman never offered one word to prove the truth of the libelous statements made by respondent Palmieri, nor did he at any time even remotely suggest that the libelous statements were uttered without malice and without an intent to injure and degrade petitioner. He relied upon absolute privilege as a defense for republication in West seven months after the initial publication.

In the answering affidavit of the petitioner it is asserted: "only the vicious malice of this defendant dictated the publication in Federal Supplement when this defendant had personal knowledge that the plaintiff had from the outset sought to have a review of the findings of this defendant that plaintiff had been rebuked" (Ap.

29a). This assertion is not denied by the respondent nor by anyone on his behalf.

Respondent Palmieri while acting as a district judge did everything in his power to prevent a review on appeal of his libelous opinion, filed in the office of the Clerk of the District Court on July 15, 1969, by refusing to make a final order directing the Clerk to enter final judgment dismissing the second cause of action based upon anti-trust violations. Had this been done it would have permitted a review by the parties litigant of the scandalous opinion insofar as it concerned the petitioner's application on his client's behalf to have Judge Palmieri disqualify himself. In consequence, to this day, no review has been possible. There is no denial of malice, an intent to injure, nor is there the slightest proof offered in support of the statement of Judge Bryan that respondent "stoutly maintains that nothing in the opinion is false or untrue or was written or published with any malice or intent to injure or degrade."

REPLY TO RESPONDENT'S ARGUMENT.

(1) The question of whether the respondent was acting in an official judicial capacity in transmitting his opinion to West Publishing Company (a private profit-making corporation), has never been answered by any court prior to the within suit, despite the contrary assertion of the respondent at page 5 of his brief that the matter was fully canvassed and decided in respondent's favor in *Garfield v. Palmieri*, 193 F. Supp. 582. That suit decided that an action did not lie under the Civil Rights provisions of the U. S. Code and the Fifth Amendment to the U. S. Constitution to redress the wrong done by the filing in the office of the Clerk of the District Court of a libelous opinion, by having it expunged. Republica-

tion in West was not even known to petitioner at the time he filed his suit nor was it involved in the complaint or decision.

In dismissing the complaint in the first cause of action Judge Bartels said:

> "A complaint so drawn as to seek a recovery for an invasion of the plaintiff's constitutional rights vests jurisdiction in this Court and enables it to decide whether or not the claim has any merit. * * * The principle exempting judges of courts of record from prosecution or suits for any *illegal* act performed during the course of a judicial proceeding over which he had jurisdiction has deep roots in the common-law. Its history has been traced in the much cited and leading case of *Bradley v. Fisher*, 80 U. S. 335 (13 Wall.)."

(2) The complaint in this action alleges that the "*defendant acting unofficially and privately in his individual capacity, and when no matter was then sub judice before him*, maliciously and with actual malice and with intent to permanently degrade and injure the plaintiff in the practice of his profession and to bring shame upon the plaintiff in his said profession, published, and advised, induced, procured, and aided and abetted in the publication in 1960 * * * of Volume 180 of Federal Supplement * * * of a false and defamatory statement of and concerning plaintiff (Ap. p. 31a).

(3) Since the statement of facts set forth in the complaint is to be accepted as true, then it matters little whether we accept New York Law or Federal Law because in either case the judicial officer is not protected for libels committed by him outside of his office no more than a Senator or Congressman is protected for libels republished from the Congressional Record by private agencies. *Murray v. Brancato* made it quite clear that under New York Law a judge is fully protected for

libels uttered while he sits in the seat of judgment. It was because Judge Brancato sent his opinion to the New York Law Journal for *Front Page* publication and to the West Publishing Company for publication in New York Supplement that he was held to answer for the libel against James D. C. Murray, a prominent trial lawyer. West Publishing Company is the publisher of Federal Supplement as it is of New York Supplement. In consequence the same basic situation applies in both federal or state publications in West.

(4) It was no more within the outer perimeter of Judge Palmieri's judicial function to send his opinion to West than it was within the outer perimeter of the judicial function of Judge Brancato to send his opinion to West. These judges simply assume (and we believe incorrectly) that they have the right to assassinate the character of lawyers who have the courage to stand up and fight for their clients' rights without giving affront to the judge, without a display of disrespect or discourtesy. If judges simply out of vanity, or to satisfy a venomous inclination or out of spite have the right to send their libelous opinions to West, then they have the same right to send it to the New York Times and to every newspaper in the country. Just as it is the duty of a judge to be fearless, so too it is the duty of a lawyer not to be cowed by judicial tyranny and by the threat of judicial character assassination should he dare stand up in court to protect his client's rights. The judicial immunity thus created below is judicial invasion of the legislative function, investing the federal judge with the power of destruction of those who incur his disfavor. The judge sitting in Foley Square in the State Court has no such judicial immunity for extrajudicial libels.

(5) We seriously dispute therefore that respondent's compliance with the request of West that he transmit the

copy of his opinion to West was the exercise of a judicial function, essential to the orderly administration of justice. There are hundreds of thousands of opinions and memoranda filed each year in the offices of the Clerks of the United States Courts, only a handful of which find their way into print. If judges could be called upon to serve a private agency such as West to send them copies of their opinions then the judicial function could be said to be at the beck and call of every private publication. If the judge refuses the request of West is he remiss in his duties? We lawyers who wish a copy of an opinion have to copy it in longhand or pay fifty cents per page for its copying by the clerk. Nor will any of the judges of the District Court supply us with copies of their decisions or opinions. They rightly state that their function ends when their opinions are filed in court.

It is vanity and vanity alone that impels a District judge to so readily comply with the request of West for a copy of his opinion. Since when has the satisfaction of the judicial vanity been within the outer perimeter of judicial function? If West or anyone else wishes to have a copy of an opinion it may send its representatives to court to analyze and copy opinions but it may not be said that if a judge voluntarily complies with a request that a copy of an opinion be sent to West seven months after the matter has been decided that such act is within the outer perimeter of the judicial function, no more than it can be said that if the judge refuses to comply that he is remiss in his duty.

CONCLUSION.

For the foregoing reasons and the reasons stated in the petition the application for a writ should be granted.

April, 1962.

GUSTAVE B. GARFIELD,
Attorney for Petitioner *pro se*.